

**Brownfields Study Group Meeting
Cleanup Policy Issues
August 25, 2004**

Attendees: Darsi Foss, Michael Prager, Judy Ohm, Linda Meyer and Pat McCutcheon (DNR) ; Kate Juno (NRT); Mark Thimke (Foley); Tom Mueller (TEMCO); Benji Timm (City of Milwaukee); Nancy Frank (UWM)

Introductions – Darsi Foss

Environmental Covenants – Linda Meyer, Pat McCutcheon, Darsi Foss

LM: Gave an overview of why the uniform environmental covenants law was developed, and why the state needs to amend state statutes to address potential common law problems related to the enforcement of deed restrictions (also called restrictive covenants) . Needed to clarify that deed restrictions run with the land, and don't just apply to the person who created the deed restriction.

Tom Mueller: Availability of information, impact on property values, and how to change restrictions are issues we need to chat about.

Group decided to walk through each section of the proposed draft of the uniform act. The following is a summary of the discussion that occurred.

Definitions:

-agree to put in definition of Administrative Record File

-“Agency” definition was discussed. Focused on the issue of all 3 state agencies that oversee cleanups doing this. Group agreed we should apply this to all 3 agencies. Would make the state more consistent.

-Nancy Frank: Purpose of all is for uniformity, why would we not apply this to all 3 agencies?

-LM: went over the definition of “holder” – it refers to persons who receive the interest in property that is being conveyed. Current owner is conveying right to enforce restrictions, and potentially, the responsibility to conduct monitoring, maintenance, etc. Generally it is the owner of the property; can be the party that caused the contamination. Allows flexibility. The holder must be designated on a site-by-site basis.

-“Person”: definition of person in Chapter 292 and the Uniform EC Law should be the same. Group agreed that the LRB should advise the group and agency on this issue.

“Registry”: Should be one Registry in the state, not one at each agency conducting cleanups; use existing Registry that DNR is maintaining. DNR is already putting Commerce sites on its Registry system.

Nancy Frank: would a site be on the registry that isn’t closed? Would this be confusing to the public?

Pat McCutcheon explained that DNR is moving towards geo-located all sites, regardless of cleanup status, and those will be available in GIS format on the web in a year or two.

Study Group would like state agencies, especially DNR, to ensure that the Registry is clear as to which Agency has jurisdiction over the cleanup and where the site file is located.

“State” definition - leave it to LRB to decide if needed.

Section 4: Subordination of Rights.

LM: Explained the general purpose of this section.

Mark Thimke: Expressed his concern over the number of approvals needed under this uniform law. Likes the idea of putting land use restriction information on a Registry, not using the deed restriction process. Deed restriction process is archaic, costly and does not adequately inform lenders and future owners. Too many transaction costs associated with this draft uniform act, particularly the number of signatures to create the EC, amend it, or terminate it.

Thimke offered an alternative proposal, which would mean changing the Spill law, and perhaps the Environmental Repair law. It would amend state law to require that persons in possession of a spill site would need to comply with conditions put on that property by the state (likely at the time of closure or COC is issued), although those responsibilities may be assumed by another person through a contract or other legal agreement. This would likely do away with the use of restrictions recorded at the county register of deeds office as the means of ensuring that engineering controls, inspections, and monitoring are done at a site after the state has closed it out or issued a certificate of completion.

Linda Meyer: Offered that there is an analogous provision in state solid waste law, which makes the new owner of a landfill responsible for complying with conditions of a solid waste license.

DNR: There may be analogous language in 292.15, Stats., that could be modeled for inclusion in 292.11. We put this in several years ago to ensure that

the Voluntary Party who is in possession of the property assumes the responsibility for any condition placed on it.

Group agreed to go ahead with two proposals (Uniform Environmental Covenant proposal and Spill Law amendment proposal) simultaneously, and work with other externals on this.

Group agreed to continue discussion on EC draft law, given that both will be moved forward

Section 5 of UEC law – contents of the EC

Legal description section: Is addition suggested by DNR – that requires recording of a copy of most recent deed and relevant plats and certified survey maps - necessary? - DNR will follow up on this one.

Section 11 – Group consensus is that too many persons need to sign this. Would be difficult to implement, both for state staff and externals.

In conclusion, the group agreed on the following.

Group agreed that whatever option/proposal we finally decide on, it should meet the following 3 goals:

1. Notice – on a consistent basis, provide easy access to the land use restrictions placed on a property
2. Liability – needs to provide clarity that the required restrictions on the property run with the land, although there may be a valid legal agreement that transfers those responsibilities to another entity
3. Enforceability – the option needs to be enforceable by the state, and it should provide the state authority to inspect (i.e., provide access to) the property

Go ahead with 2 proposals. Provide more substance to Non-EC option. Two options should be ready for discussion at the September 30th BF Study Group Meeting.

Other topics discussed at the meeting included:

1. Supreme Court Case on using s. 107 of CERCLA to cost recover. Also, put the Aviall case on the September 30th agenda. Decision item: do we go ahead with specific state legislation on private cause of action. Aviall Supreme Court case could impact clean ups in the state, by making them go through federal process, or curtailing cleanups.
2. Voluntary Party Liability Exemption and Landfills. Current limitations in s. 292.15, Stats., regarding the types of landfills that can receive a VPLE exemption, were discussed. Presently, the only types of “landfills” that can

receive a VPL exemption are paper mill sludge, foundry, fly ash, & mining sites. The group expressed a strong interest in expanding the type of landfills that can participate. Some recommended that the limitation on landfills be removed in its entirety. The suggestion was made that the law should allow for all landfills to enter the VPLE process, with the understanding that very few could be approved due to the technical issues involved. In other words, few landfills would likely achieve the requirements set out in ch. NR 726 and s.292.15, Stats.

DNR staff committed to going back and talking with the Waste Program, and providing an issue paper on this in advance of the September 30th meeting.

Next Meetings:

September 14 – Local Government Issues – UW Madison Memorial Union

September 30 – Full Brownfields Study Group – Madison Pyle Center